

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

June 18, 2014

FOR THE TENTH CIRCUIT

**Elisabeth A. Shumaker
Clerk of Court**

UTE INDIAN TRIBE OF THE UINTAH
AND OURAY RESERVATION,

Plaintiff Counterclaim
Defendant-
Appellant/Cross-Appellee,

v.

STATE OF UTAH; DUCHESNE
COUNTY, a political subdivision of the
State of Utah,

Defendants
Counterclaimants-
Appellees,

UINTAH COUNTY, a political
subdivision of the State of Utah,

Defendant Counterclaimant
Third-Party Plaintiff-
Appellee/Cross-Appellant,

ROOSEVELT CITY, a municipal
corporation; DUCHESNE CITY,
a municipal corporation; NORTHERN
UTE TRIBE; MYTON, a municipal
corporation,

Defendants,

BRUCE IGNACIO, Chairman of the Ute
Tribal Business Committee, in his official
capacity,

Defendant Third-Party
Defendant,

Nos. 14-4028 & 14-4031
(D.C. No. 2:75-CV-00408-BSJ)
(D. Utah)

and

GORDON HOWELL, Chairman of the Business Committee; BUSINESS COMMITTEE FOR THE UTE TRIBE OF THE UINTAH AND OURAY RESERVATION; RONALD J. WOPSOCK; STEWART PIKE, member of the Ute Tribal Business Committee, in his official capacity; TONY SMALL; PHILIP CHIMBURAS, member of the Ute Tribal Business Committee, in his official capacity; PAUL TSOSIE; WILLIAM REYNOLDS, Judge of the Ute Tribal Court, in his official capacity,

Third-Party Defendants.

In re:

UTE INDIAN TRIBE OF THE UINTAH
AND OURAY RESERVATION,

Petitioner.

No. 14-4062
(D.C. No. 2:75-CV-00408-BSJ)
(D. Utah)

ORDER

Before **KELLY, O'BRIEN**, and **HOLMES**, Circuit Judges.

The Ute Indian Tribe has filed a motion for a stay pending appeal in case number 14-4028. The Tribe seeks to prevent the State of Utah and Uintah County from continuing with the criminal prosecution of Navajo Nation tribal member, Everett Black, for misdemeanor assault allegedly committed within the boundaries of

the Tribe's Uintah and Ouray Reservation. The State of Utah and Uintah County have filed responses in opposition to the motion, and the Tribe has filed a reply.

The Tribe has also filed a petition for a writ of mandamus in case number 14-4062. The Tribe seeks an order directing the district court to rule on its pending motion for partial summary judgment and a permanent injunction or, in the alternative, an order directing the district court to enter broad injunctive relief in its favor.

For the following reasons, we deny the motion for stay and the mandamus petition.

14-4028, *Motion for Stay or Injunctive Relief Pending Appeal*

Although the Tribe captions its motion as one for a stay pending appeal, it wants an order enjoining the State of Utah and Uintah County from continuing with their criminal prosecution of Mr. Black. This request is in the nature of injunctive relief. To be entitled to an injunction pending appeal, the moving party must address the basis for this court's jurisdiction and (1) "the likelihood of success on appeal;" (2) "the threat of irreparable harm if the stay or injunction is not granted;" (3) "the absence of harm to the opposing parties if the stay or injunction is granted;" and (4) "any risk of harm to the public interest." 10th Cir. R. 8.1.

In its motion, the Tribe argues that it is entitled to injunctive relief because it will prevail on the merits of its claim that the Tribe, not the State, has jurisdiction over the land where Mr. Black's alleged crime occurred. In Uintah County's

response to the motion for stay, it argues that the issue of Mr. Black's prosecution is not on appeal, the sole issue on appeal is sovereign immunity, and the Tribe's motion applies the wrong standard for a motion under Rule 8.1. As Uintah County explains,

the Tribe argues the likelihood of success on the merits of *Mr. Black's challenge to the state's jurisdiction* as opposed to the "likelihood of success on *appeal*." 10th Cir. R. 8.1. Rule 8.1 does not provide a proper mechanism by which a party can seek a stay based on an unresolved motion that was filed in the District Court.

Uintah County Resp. at 9 n.5. The Tribe offers no rebuttal to this argument in its reply.

We agree with Uintah County that the Tribe's motion is fundamentally flawed because it seeks injunctive relief from Mr. Black's prosecution pending appeal when the appeal pending before this court in case number 14-4028 is from the district court's denial of the Tribe's motion to dismiss on the basis of sovereign immunity the counterclaims filed by Uintah County. The Tribe does not address how it is likely to succeed on the merits of the appeal that is actually pending before this court and fails to explain how its request for injunctive relief relates to the issues that are on appeal from the denial of its motion to dismiss on the basis of sovereign immunity. Instead, it argues for this court to grant injunctive relief on appeal before the district court has had a chance to rule on such a request in the first instance.

The purpose of a stay or injunction pending appeal "is to preserve the status quo pending appeal so that the appellant may reap the benefit of a potentially meritorious appeal." *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*,

356 F.3d 1256, 1267 (10th Cir. 2004) (internal quotation marks omitted). But even if the Tribe is successful on appeal in overturning the denial of its motion to dismiss the counterclaims, that simply means the Tribe will not have to defend against the counterclaims. A successful appeal on that issue will provide no benefit regarding Mr. Black's prosecution.

The Tribe attempts to argue that its motion is essentially the same as the motion that a panel of this court granted earlier in appeal number 14-4034. But in that appeal, the district court had entered an order denying the Tribe's motion for a preliminary injunction, and the Tribe's argument as to its likelihood of success on appeal was tied to the district court's ruling that was on appeal. We do not have that situation here.

Because the Tribe has failed to establish its entitlement to an injunction pending appeal, we deny the motion. We also remind the Tribe that any future requests for stays or injunctive relief pending appeal must comply with Fed. R. App. P. 8(a)(2)(A), which requires the motion to be filed first in the district court or to show that moving first in the district court would be impracticable. We note that the district court retains jurisdiction during an interlocutory appeal over "certain ministerial functions in aid of the appeal, such as . . . issuing stays or injunctions pending appeal." *Stewart v. Donges*, 915 F.2d 572, 575 n.3 (10th Cir. 1990) (internal quotation marks omitted).

14-4062, Petition for Writ of Mandamus

The Tribe asserts that it is entitled to an order directing the district court to rule on its motion for partial summary judgment and permanent injunctive relief filed on November 27, 2013. Alternatively, the Tribe wants this court to “frame the terms of an injunction” and (1) direct the trial court to enjoin the State defendants from exercising criminal jurisdiction over Indians for offenses committed within the Uintah and Ouray reservation, and (2) from relitigating the Tribe’s reservation boundaries in any court, administrative forum, or other law-applying forum during the pendency of this appeal.

“[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances.” *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal citation and quotation marks omitted). “[A] writ of mandamus is used only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” *Id.* (internal quotation marks omitted). In order to be entitled to a writ of mandamus, three conditions must be met:

First, because a writ is not a substitute for an appeal, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires. Second, the petitioner must demonstrate that his right to the writ is clear and indisputable. Finally, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.


Id. at 1187 (internal citations and quotation marks omitted).

The Tribe has failed to show that its right to the writ is clear and indisputable. By virtue of Uintah County's interlocutory cross-appeal from the denial of its motion to dismiss based on immunity from suit, the district court has been divested of jurisdiction over the Tribe's claims and requests for injunctive relief against Uintah County. *See, e.g., Stewart*, 915 F.2d at 576 (“[A]n interlocutory appeal from an order refusing to dismiss on double jeopardy or qualified immunity grounds relates to the entire action and, therefore, it divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant.”). The district court therefore does not have the authority at this time to rule on the motion for partial summary judgment and permanent injunction to the extent it seeks relief against Uintah County.

With respect to the Tribe's alternative request for an order directing the district court to enter an injunction, the Tribe has failed to demonstrate that it lacks alternative remedies for the relief it seeks or that it has a clear and indisputable right to have this court direct the district court to enter such a broad injunction. The district court retains jurisdiction to consider requests for injunctive relief against any of the state defendants other than Uintah County.

We deny the Tribe's motion for a stay pending appeal, and we deny the Tribe's petition for a writ of mandamus.

Entered for the Court

A handwritten signature in black ink, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right. The signature is written over a faint, dotted rectangular box.

ELISABETH A. SHUMAKER, Clerk